APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 81-1537

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

TRANSPORTATION MANAGEMENT CORP., RESPONDENT.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before
COFFIN, *Chief Judge*,
TIMBERS,* *Senior Circuit Judge*,
and BREYER, *Circuit Judge*.

April 1, 1982

PER CURIAM. The National Labor Relations Board seeks enforcement against the Transportation Management Corporation (the "Company") of an order based upon Board findings that the Company violated § 8(a)(1)[1] and § 8(a)(3)[2] of the National Labor Rela-

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*Of the Second Circuit, sitting by designation.

[1]Section 8(a)(1) provides: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . ." 29 U.S.C. § 158(a)(1) (1976). Section 7 provides in perti-

tions Act. Several of the findings of § 8(a)(1) violations are adequately supported by the record. The record reveals, for example, that Paterson, a supervisor, spoke to West, an employee and the brother-in-law of Santillo, another employee who was a union activist. In the conversation Paterson referred to Santillo's union activity, suggested that he (Paterson) was taking it "personal," noted that he had previously given Santillo favors (such as letting him park his car in Paterson's yard and giving him time off in the summer to work on another job), and threatened that in the future "I'll remember it." Paterson also told a different employee, Baer, that he would "get even" with Santillo. While Paterson's motives were the subject of conflicting testimony, there is ample ground for a fact finder to conclude that Paterson's threats were union-oriented, gave an impression of surveillance, *see NLRB* v. *Rich's of Plymouth, Inc.*, 578 F.2d 880 (1st Cir. 1978), and constituted unlawful coercion. *NLRB* v. *A. Lasaponara & Sons, Inc.*, 541 F.2d 992, 996–97 (2d Cir. 1976), *cert. denied*, 430 U.S. 914 (1977).

The Board also found the Company's discharge of Santillo unlawful under both §§ 8(a)(1) and 8(a)(3) of the Act. In making this finding, however, the Board did not conclude that "upon the preponderance of the testimony taken," it was "of the opinion" that the Company had engaged in an unfair labor practice. National Labor

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nent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." *Id.* § 157.

[2] Section 8(a)(3) provides in pertinent part: "It shall be an unfair labor practice for an employer—(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 29 U.S.C. § 158(a)(3) (1976).

Relations Act § 10(c), 29 U.S.C. § 160(c). Rather, it based its finding of a violation upon a conclusion that the Company "failed to meet its burden of *overcoming* the General Counsel's *prima facie* case by establishing by competent evidence that Santillo would have been discharged even absent his union activities." (Emphasis added.) While this court has upheld the Board's practice of imposing upon the Company the burden of *neutralizing* the implication of sufficient anti-union motive arising from the General Counsel's *prima facie* case, *Statler Industries, Inc.* v. *NLRB*, 644 F.2d 902 (1st Cir. 1981); *NLRB* v. *Amber Delivery Service, Inc.*, 651 F.2d 57 (1st Cir. 1981); *NLRB* v. *Cable Vision*, 660 F.2d 1 (1st Cir. 1981), it has rejected both explicitly, *NLRB* v. *Wright Line*, 662 F.2d 899 (1st Cir. 1981), and implicitly, *NLRB* v. *Amber Delivery Service, Inc.*, 651 F.2d at 69; *NLRB* v. *Cable Vision*, 660 F.2d at 8; *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 671 n.12 (1st Cir. 1979),[3] any effort by the Board to impose a *greater* burden than this upon the Company, as outside the Board's statutory authority. We therefore remand this case to the Board for reconsideration under the standard of *NLRB* v. *Wright Line*, *supra*. *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). Since the Board's order is based in large part upon Santillo's discharge, we do not believe that partial enforcement at this time is appropriate.

So ordered.

BREYER, *Circuit Judge* (concurring). The Board, in oral argument in this case and in briefs in subsequent cases, has indicated an unwillingness to follow this court's decision in *NLRB* v. *Wright Line*, 662 F.2d 899

[3] While *Statler Industries* did appear to approve the Board's *Wright Line* test, which imposes such a burden, it did not focus upon this particular subsidiary issue.

(1st Cir. 1981), and has asked for reconsideration. While I join the court's opinion here, I also concur separately to state my reasons for rejecting the Board's request.

First, I think the Board may overestimate the extent of the difference between its formulation and our own. Both Board and court agree that in a "dual motive" discharge case "the initial inquiry is whether the Board has made a *prima facie* showing that a 'significant improper motivation' underlay the Company's action." *NLRB* v. *Cable Vision*, 660 F.2d 1, 8 (1st Cir. 1981); *NLRB* v. *Amber Delivery Service*, 651 F.2d 57, 69 (1st Cir. 1981); *Statler Industries, Inc.* v. *NLRB*, 644 F.2d 902, 905 (1st Cir. 1981); *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 671 (1st Cir. 1979). In making this *prima facie* case, the Board must establish the "requisite knowledge by the Company of union activity." The "bad reason may [then] be shown by independent evidence or by the circumstances of the discharge itself." *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d at 670. Both Board and court also agree that thereafter "the burden . . . shifts to the Company to 'prove that it had a good reason, sufficient in itself, to produce' the [discharge] . . . *Statler Industries, Inc.* v. *NLRB*, 644 F.2d at 905, *quoting NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d at 671." *NLRB* v. *Cable Vision*, 660 F.2d at 12. But, the Board and court apparently do not agree about who should win if, after both sides have submitted their evidence, the evidence is in "equipoise."

We made clear both in *Cable Vision* and in *Amber Delivery* that in such a situation, the employer must prevail, for we wrote, "This shift [of the burden of proof to the Company] does not impose an overall burden upon the Company of proving itself 'innocent' of violating the statute. Rather, it must simply come forward with enough evidence to convince the trier of fact

that, under the circumstances, there is no longer a preponderance of evidence establishing a violation." *NLRB* v. *Cable Vision*, 660 F.2d at 13. This language generalized the court's statement in *Eastern Smelting* that when the employer presents evidence of a good and sufficient motive for the discharge, the Board "may not reject the employer's proof, absent a reasonable basis." *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d at 671 n.12. In turn, *Cable Vision* and *Amber Delivery* elaborated this point, and finally the point was analyzed still more carefully in *Wright Line*. Yet there is nothing in *Wright Line* that reflected any departure from prior court decisions.

While the *Wright Line* formulation does, of course, mean that the employer wins in a case where the record cannot be fairly said to make out a violation by a preponderance of the evidence, this is surely what one would expect. *See Edison Co.* v. *Labor Board*, 305 U.S. 197, 229 (1938). The burden of proof formulation does not itself add to, or detract from, the requirement of substantial evidence. *Cf. Miranda* v. *HEW*, 514 F.2d 996, 998 (1st Cir. 1975). Thus, I do not see the court's *Wright Line* formulation as being of great practical significance. *Wright Line*, for example, does not tell the Board what it can, or cannot, conclude from silences in the record; that is a matter governed by the facts of a particular case, experience, and common sense.[1] Rather, *Wright Line* simply tells the Board that

[1] *E.g.*, if I see water pouring down outside the window, I can reasonably infer that it is raining, although my inference in part depends upon the absence of evidence that there are small boys with a garden hose standing on the roof. Add to the record, however, the facts that there are such small boys and the sun is shining, and my inference of rain becomes unreasonable. If I try to support it by pointing to an *absence* of evidence in the record that the hose was turned on, I am still acting unreasonably. Because of the *facts* involved, a conclusion based in part upon the

after the evidence is in, it must itself make a judgment about whether the evidence *overall* does or does not support a finding of violation; it cannot avoid this issue by retreating to the language of "burdens of proof."

Second, as the court pointed out in *Wright Line*, the relevant statutes compel the result we reached. Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), provides that the Board must dismiss a complaint when "upon the preponderance of the testimony taken" the Board "shall not be of the opinion" that an unfair labor practice was commited. Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556, states that "Except as otherwise provided by statute, the proponent of [an] order has the burden of proof." And, the Board's rules themselves state that "the Board's attorney has the burden of proof of violations of section 8." 29 C.F.R. § 101.10(b). How, in the face of this language, is it possible not to hold that the overall burden of proving a violation remains with the Board?

The Eighth Circuit has recently written that there is a "reasonable basis in law" for the Board's *Wright Line* burden shifting, apparently disagreeing as well with the narrow "overall burden" question at issue here. *NLRB* v. *Fixtures Mfg. Co.*, No. 81–1398, slip op. at 6–7 n.4 (8th Cir. Jan. 14, 1982)[2]. The Eighth Circuit

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record's silence is reasonable in the first instance but not in the second. Most silences in an administrative record are of this factual sort; burden of proof rules only occasionally affect the conclusions that might be drawn from them.

[2]There are decisions in other circuits either accepting—*NLRB* v. *Robin American Corp.*, 654 F.2d 1022 (5th Cir. 1981); *NLRB* v. *Consolidated Freightways Corp.*, 651 F.2d 436 (6th Cir. 1981); *Charge Card Ass'n* v. *NLRB*, 653 F.2d 272 (6th Cir. 1981); *Peavey Co.* v. *NLRB*, 648 F.2d 460 (7th Cir. 1981); *NLRB* v. *Nevis Industries, Inc.*, 647 F.2d 905 (9th Cir. 1981)—or rejecting—*TRW, Inc.* v. *NLRB*, 654 F.2d 307 (5th Cir. 1981)—the Board's *Wright Line* test. But with the excep-

rests its opinion, however, upon its belief that the "overall burden" question is one as to which a court should defer to agency views. I doubt that this is so: Whether the Board can impose such an overall burden on the employer is a pure question of law. It involves a major and important section of the authorizing statute; it is not "interstitial;" and the language of the statute as well as its legislative history seem clear. *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491–93 (1947); *Constance* v. *Secretary of Health and Human Services*, No. 81–1322, slip op. at 11 (1st Cir. March 5, 1982). The fact that the agency might find such burden shifting administratively useful would be significant had Congress intended to delegate such authority to the agency, but that is not the case here. *Social Security Board* v. *Nierotko*, 327 U.S. 358, 368–69 (1946). Here the issue is one of statutory language and congressional intent. These indicate quite clearly that the Board, not the employer, must bear the overall burden of showing a violation of the Act.

Finally, it is worth recalling that one major purpose underlying court review of administrative agency decisions is that of keeping agency action within statutory bounds laid down by Congress—including those statutory qualifications that limit the agency's more important basic mission. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667 (1975). To do so, Congress has entrusted courts with primary responsibility for determining questions of law related to the agency's mission. Administrative Procedure Act § 10(e), 5 U.S.C. § 706. And, to prevent the agencies from extending that mission or escaping statutory limitations through one-sided fact-finding, Congress has required the courts to make certain that fac-

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tion of *Fixtures*, and possibly *Nevis*, none has considered explicitly the point here at issue.

tual findings are supported by "substantial evidence" on the basis of the "whole record." *Id. See Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487–92 (1951). This historic division of tasks between court and agency, and the major purpose underlying it, suggests why it is desirable to require the Board to certify that, after hearing both sides, it still believes the evidence in the record by a preponderance shows a violation of the statute: Doing so forces the agency to focus directly on what Congress told it to do; it prevents the agency from retreating behind the opaque language of "burden of proof;" and it simplifies the work of a reviewing court, which would otherwise be uncertain as to when it could, and when it could not, properly overturn an agency decision. (Compare the difficulty of deciding whether there is substantial evidence on the record as a whole that the employer has not *proved* that the bad motive did *not* move him.)

In sum, this court's *Wright Line* opinion imposes little practical burden on the Board; it is required by statute; and it is, in terms of general agency/court relations, simplifying. I therefore think this court is correct in deciding not to modify it.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 81-1537

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

TRANSPORTATION MANAGEMENT CORP., RESPONDENT.

DECREE

Entered: April 1, 1982

This cause came on to be heard on application for enforcement of an order of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged, and decreed as follows: The petition for enforcement of the National Labor Relations Board is denied and the proceeding is remanded to that Board for reconsideration in accordance with the opinion of the Court filed this day.

No costs.

By the Court:

/s/ _____

DANA H. GALLUP
Clerk.

A True Copy
Attest:

DANA H. GALLUP
Clerk.

APPENDIX C

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 1—CA—15846

256 NLRB No. 25

FJZ
D—7597
Springfield, MA

TRANSPORTATION MANAGEMENT CORP.

AND

GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, BUILDING MATERIALS, HEAVY & HIGHWAY CONSTRUCTION EMPLOYEES LOCAL UNION 404, A/W THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On February 8, 1980, Administrative Law Judge Steven B. Fish issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclu-

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are in-

sions[2] of the Administrative Law Judge, as clarified herein, and to adopt his recommended Order,[3] as modified herein.

The Administrative Law Judge found, and we agree, that Respondent discharged employee Santillo in violation of Section 8(a)(3) and (1) of the Act. We arrive at that conclusion by applying to the facts of this case the test we have recently enunciated in our Decision in *Wright Line, Inc.*[4] In the application of this test, the first element to be determined is whether the General Counsel has established a *prima facie* case for the finding of a violation.

In this regard the General Counsel established by credible evidence that Santillo was a leading union activist and, in fact, was the one responsible for first contacting the Union. Respondent soon became aware of Santillo's role as union activist by its unlawful interrogation of employees. Thus, in a conversation between Respondent's manager, Patterson, and employee Baer, Patterson stated that he had heard that Santillo had started the Union and that he (Patterson) considered Santillo to be "two faced" and threatened to get even with him. In another conversation between Patterson and employee West, Patterson asked West, "What's with Sam and the Union" and Patterson promised to re-

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correct. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] On the basis of *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), the broad order recommended by the Administrative Law Judge is not warranted. Accordingly, we shall modify the recommended Order in this respect.

[3] Member Jenkins would compute interest in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB No. 11 (1980).

[4] *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB No. 150 (1980).

member Santillo's union activity when Santillo wanted privileges.

The foregoing evidence establishes beyond doubt that Respondent had knowledge of Santillo's union activity and that it intended to retaliate against Santillo because of these actions. It also demonstrates that Respondent evidenced a strong union animus. Finally, Santillo was discharged the day after Patterson made his threat to "get even" with Santillo. In such circumstances, we find that the General Counsel has established by strong and credible evidence a *prima facie* case for finding that Santillo was discharged in violation of Section 8(a)(3) of the Act.

The only remaining question, therefore, is whether Respondent has shown, by other evidence, that Santillo's discharge would have occurred without regard to these considerations. Respondent offers three reasons to justify Santillo's discharge. The first is that he left the keys in his bus on the day of his discharge, which is a violation of company policy. The evidence shows, however, that it is a common practice among the drivers to leave the keys in their buses and, in Santillo's case, we have Patterson's admission that he had decided to discharge Santillo before he had any knowledge that the keys had been left in the bus. Accordingly, we conclude, as did the Administrative Law Judge, that this is nothing more than a purely pretextual reason which does more to detract from the lawfulness of the discharge than support it.

The second reason offered by Respondent was that Santillo was "stealing time" by taking unauthorized coffeebreaks. In this connection, the evidence shows that Santillo did in fact take coffeebreaks, but this was a normal practice among the drivers. The evidence further shows that such practices were tolerated unless these breaks affected the driver's ability properly to

perform his job functions. In situations where the taking of such breaks adversely affected the driver's job performance, Respondent's practice was to change the driver's route, increase the number of children to be delivered, or refuse to pay the driver who was taking unauthorized time. In no such instance is there any evidence of disciplinary action being taken, much less any suspension or discharge.

The third and last reason relied on by Respondent was Santillo's practice of stopping off at his home before reporting at the garage which Respondent also characterized as "stealing time." The evidence establishes that Santillo, in fact, did engage in such a practice and there is no showing that Respondent either directly or indirectly condoned such a practice. On the other hand, when Respondent finally became convinced that Santillo was taking unauthorized time, Respondent did not confront him with the evidence or warn him of possible disciplinary action. Nor did Respondent follow its regular procedure of three written warnings before discharge.

On the basis of this evidence, we conclude that Respondent has failed to meet its burden of overcoming the General Counsel's *prima facie* case by establishing by competent evidence that Santillo would have been discharged, even absent his union activities. Accordingly, we find, in agreement with the Administrative Law Judge, that Respondent discharged Santillo in violation of Section 8(a)(3) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Transportation Management Corp., Springfield, Massachusetts, its

agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(e):

"(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. May 20, 1981

JOHN H. FANNING,
Chairman

HOWARD JENKINS, JR.,
Member

DON A. ZIMMERMAN,
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

We intend to abide by the following:

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collectively bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discharge or otherwise discriminate against any employees to discourage membership in General Teamsters, Chauffeurs, Warehousemen and Helpers, Building Materials, Heavy & Highway Construction Employees Local Union 404, a/w the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, or any other labor organization.

WE WILL NOT discharge or otherwise discriminate against our employees because of their activities on behalf of or support for the Union or any other labor organization.

WE WILL NOT interrogate our employees regard-

ing their activities on behalf of or support for the Union or any other labor organization.

WE WILL NOT create the impression among our employees that we have engaged in surveillance of their union or other concerted activities.

WE WILL NOT threaten our employees that we will get even with employees, or withdraw privileges or favors previously granted to employees, or otherwise retaliate against our employees, because of our employees' activities on behalf of or support for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Sam Santillo immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights, and privileges previously enjoyed, and WE WILL compensate him, with interest, for any loss of pay he may have suffered because we terminated him.

TRANSPORTATION MANAGEMENT CORP.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Keystone Building, 12th Floor, 99 High Street, Boston, Massachusetts 02110, Telephone 617-223-3313.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CASE NO. 1-CA-15,846
JD-(NY)-4-80
SPRINGFIELD, MA

TRANSPORTATION MANAGEMENT CORP.

AND

GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, BUILDING MATERIALS, HEAVY & HIGHWAY CONSTRUCTION EMPLOYEES LOCAL UNION 404, A/W THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

THOMAS P. KENNEDY, *Esq.*,
for the General Counsel

C. FRED WELENSKY, *Esq.*,
of Boston, MA, for the Respondent.

DECISION

Statement of the Case

STEVEN B. FISH, Administrative Law Judge: Upon a charge filed on March 28, 1979,[1] by General Teamsters, Chauffeurs, Warehousemen and Helpers, Building Materials, Heavy & Highway Construction Employees Local Union 404, a/w The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, the Regional Director for Region 1 issued a Complaint and

[1] All dates are in 1979 unless otherwise stated.

Notice of Hearing on May 9. The Complaint alleges that Transportation Management Corp., herein called Respondent or the Company, violated Section 8(a)(1), and (3) of the Act, by interrogating its employees concerning their union activity, warning an employee that it would get even with another employee who was active on behalf of the Union, creating the impression of surveillance of Union activity among its employees, and by discharging and refusing to reinstate its employee Sam Santillo, herein called Santillo, because he joined and assisted the Union.

Pursuant to notice, a hearing was held before me on October 4 and 5 in Northampton, Massachusetts. Briefs have been received from counsel for General Counsel and counsel for Respondent, and have been duly considered.

Upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. The Business of Respondent

Respondent, a Massachusetts Corporation, maintains an office and place of business in Springfield, Massachusetts, where it is engaged in providing transportation services to various local school boards in the Commonwealth of Massachusetts. Respondent, annually, purchases gasoline and automobile products valued in excess of $50,000, indirectly from points located outside the State of Massachusetts. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

It is admitted that and I accordingly conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Facts*

Santillo began his employment at Respondent's Springfield location in October 1976 as a school bus driver. Of the 70 or so drivers employed at this location by Respondent, three or four employees were more senior than Santillo. Santillo began at a salary of $2.30 per hour, and received various raises from 1976 through 1979 to a salary of $6.15 per hour.

On March 19, Santillo and employee John Walker went to the offices of the Union.[2] They spoke to Union officials Eddie Lymon and John Adamski and discussed the possibility of sending Union representatives down to the garage to speak to the drivers. Santillo signed an authorization card for the Union on that day.

Santillo then returned to work and spoke to six or seven other drivers about supporting the Union, and ascertained that these employees were interested. The next day, March 20, Santillo returned to the Union hall and picked up 50–60 authorization cards to distribute to the employees. Santillo over the next several days distributed cards to and discussed the Union with a number of employees at the garage, in the parking lot, and some outside the Respondent's premises who live in Santillo's area. By March 23, Santillo testified that he had obtained seven signed authorization cards from Respondent's employees.

On March 22, George Patterson, Respondent's Springfield area manager, approached Joseph Baer, a driver and mechanic of Respondent, at about 10 p.m. at the Train Stop in Holyoke, Massachusetts, where Baer was employed as a musician at night. According to

[2]Prior, thereto, employees had been complaining among themselves about various problems on the job, such as gassing up on their own time, and time going from their home to pick up children being unpaid time.

Baer, this was the first time that Patterson had ever appeared where Baer was working at night. Patterson asked Baer if he heard anything about the Union. Baer replied no, and the conversation ended.

The next night, March 23, Baer was performing at Lynn's Lounge in Chicopee, and Patterson again appeared. On this occasion Patterson told Baer that he (Patterson) heard Santillo started the Union, called Santillo two faced, and said that he was going to get even with Santillo. Patterson also complained to Baer about Santillo calling Patterson's girlfriend and trying to go out with her, and again stated that he would get even with Santillo.[3]

On the same evening, March 23, at about 7 p.m., at the Respondent's terminal, Patterson had a conversation with Ed West, a driver, who is the brother-in-law of Santillo. Patterson asked West, "What's with Sam and the Union?" West replied that he did not know anything about it, other than Sam had a lot of people complaining to him and he just wanted to help them. Patterson replied that he was taking it "personal" and referred to the fact that Patterson had permitted Santillo to park his car in Patterson's yard and had allowed Santillo to take time off from work in the summer to go to another job.[4] Patterson added that when Santillo wants such favors again, "I'll remember it."[5]

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[3]These findings are based on the undenied testimony of Baer which I credit.

[4]Apparently, Santillo had a job running a Fair stand in the summer and was permitted by Patterson to leave early for this purpose.

[5]These findings are based on the testimony of Ed West. Patterson testified that he recalls a conversation with West on that evening, but does not recall anything that was said, other than that the subject of the Union was not mentioned. I credit the testimony of West since I found him to be a believable and

West, on that evening went home and told Santillo of his conversation with Patterson.

The next morning, March 24, at around 11 a.m., Santillo called Patterson at Respondent's premises. Santillo told Patterson that West had informed him that Patterson was taking it personally, and that he wanted Patterson not to take it personally. He went on to say that he still feels that Patterson was his friend and that it is really between the Union and TMC. Santillo added that he understood Patterson's position, being manager, but that in Santillo's view, "you and I are out of the picture." Patterson answered that he understood, and that when Santillo explains this union thing to the drivers, that he should make sure to explain to them what the rates really are. Santillo replied, that he was accurately informing the employees about the rates of pay, and that he was just telling them that the union is possibly coming to talk to the employees. Patterson concluded the conversation, by saying that when Santillo comes in on Monday morning that he (Patterson) was going to have to pretend in front of other employees that he was mad at Santillo.

Patterson testified that he was rather upset at the time of this conversation. When asked what he was upset about at the time, Patterson responded, "I was upset about the time and the union, being in about my 70th hour of work. I was pretty much upset at that time."

On that same Saturday morning, March 24, Patterson had a further conversation with employee Baer at the garage.[6] Patterson asked Baer if he had signed a

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forthright witness, and particularly since Patterson could not recall any part of the conversation.

[6]The record does not establish whether or not this conversation was before or after Patterson's phone conversation with Santillo discussed above.

union card. Baer denied that he had signed. Patterson then told Baer about the time that he had some dealings with the Union and how they screwed him. Patterson then went into his office and came out a few minutes later. He then told Baer that he was not supposed to ask any questions about the Union. Baer replied that he could have told Patterson that. Patterson asked why Baer had not told him and then told Baer not to mention anything about the conversations they had about the Union.

These findings are based on the undenied testimony of Baer which I credit. Patterson, although he did not testify concerning any conversations with Baer, did indicate that either on Friday night or Saturday, he was briefed by Respondent's Vice-President Sullivan on his obligations under Federal Law with respect to discussing the Union with employees. This tends to reinforce Baer's testimony that he was told by Patterson that the latter was not supposed to ask any questions about the Union. Patterson admitted that he had questioned several drivers about the Union. The only specific employee that he recalled asking was driver David Stebbins. Patterson admitted that he asked Stebbins if he knew anything about the Union and Stebbins replied yes and that he had in fact signed a card and was for the Union. Patterson then asked why he was for the Union and Stebbins responded that it takes a giant to fight a giant. Patterson then added that he could see that point, but asked Stebbins if he ever had any problems with this organization as far as grievances go. Stebbins replied no.

Patterson also testified in response to a question from his attorney that prior to Santillo's discharge, he was aware of the fact that about 22 other employees (including Baer and West) were also in favor of the Union. His knowledge according to Patterson, with the exception of Stebbins, came from discussions with other

employees, in all cases initiated by the employees themselves. However, on cross-examination Patterson could not recall which employees had told him about the Union activities of the employees named, nor any details about any of the conversations.

Patterson also admitted that he was aware of Santillo's Union activities sometime prior to March 26. At first Patterson testified that his first knowledge of Santillo's activities came during the phone conversation that he had with Santillo on March 24 in which Santillo told him not to take it personally. Patterson later changed his testimony on this issue, and said that he had been told unsolicited by one or two employees that Santillo had approached them and was talking about the Union. He also testified that he was unaware that Santillo had any leadership role in the Union's organizational activities at the Respondent's premises.

I find Patterson's testimony in this area to be highly dubious and unworthy of credence.

Since I have already credited Baer and West that Patterson interrogated them about Union activities, during which Santillo's Union activities in particular were discussed, and Patterson accused Santillo of having started the Union, and since I find it incredible to believe that 22 employees would approach Patterson and unsolicited tell him about union activities of others, as well as Patterson's own admission that he did recall specifically interrogating one employee, and his earlier testimony that he also asked several others about union matters, and the fact that he admits being told by higher management on March 24, that under the law he should not be asking employees about the union, I find that during the week prior to Santillo's discharge on March 26, Patterson conducted an extensive campaign of interrogating a number of employees about their union activities during which he ascertained that Santillo was one of the prime organizers of the union campaign.

On Saturday, March 24, Santillo called about 70 drivers on the phone, and informed them of a Union meeting to be held on Monday, March 26 at 6 p.m. at the Union hall on Chestnut Street.

On Monday, March 26, Union officials Lymon and Adamski were outside the Respondent's premises distributing leaflets, announcing the Union meeting held that evening. Santillo at about 9:30 a.m. stopped and spoke to the Union officials for a period of about 15 minutes. There is no evidence in the record that any management officials saw Santillo speaking with these Union officials. Patterson admits that he saw the Union officials distributing leaflets on that day and that he read them and was therefore aware that a Union meeting was scheduled to be held on that evening. Patterson denies that he observed or was aware of Santillo talking to the Union officials while the leaflets were being distributed. General Counsel characterizes Patterson's testimony in this regard as "impossible to believe," and urges that Patterson be found to have been aware of Santillo's speaking to the Union agents while leaflets were being distributed. Although, it can be surmised that Patterson may have observed or been made aware of this activity by Santillo, I find that it is also conceivable that Patterson did not happen to look out at the Union officials leafleting during the 15 minute period that Santillo was talking with them. Accordingly, I find the record insufficient to establish that Respondent was aware of this activity on the part of Santillo on March 26.

Later on in the day, Santillo was called into Patterson's office. Present were Patterson, Santillo and Russel Van Horn, Respondent's supervisor. Patterson informed Santillo that he was being fired for leaving his keys in the bus, and taking unauthorized breaks. Santillo asked for the reasons in writing and Patterson told him to wait outside while he calls the main office.

Patterson then called the office and spoke to Richard Zimmerman, Respondent's president. Patterson informed Zimmerman of the fact that he had terminated Santillo, and told him that Santillo was interested in the Union and that Santillo had asked for the reasons in writing. Zimmerman affirmed the action of discharge and instructed Patterson not to give Santillo any reasons in writing. After the phone call, Patterson informed Santillo that he should leave the premises immediately and that he was officially fired. Santillo replied that he was not going to let this rest and that he planned on fighting the action. Patterson then added, "By the way this has nothing to do with the Union." As Santillo was leaving, Van Horn said to Patterson that he thinks that Respondent was nuts or crazy for letting Santillo go at that point in time, because of the Union meeting that night as they would make a "mountain" out of Mr. Santillo.[7]

Patterson explains that the main reason for his decision to terminate Santillo was Santillo's alleged "stealing time," and that the failure to put his keys on the rack was a subsidiary additonal reason for his action.

The stealing time allegation relates to the practice engaged in by Santillo of taking a coffee break in the mornings while between routes, and Santillo's stopping at his house for about 15 minutes per day on the way back to the garage before reporting in and punching out. Since Santillo was on the clock and being paid for

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[7]The above remarks of Van Horn are based on the testimony of Santillo which I credit since they were undenied by Patterson and Van Horn did not testify. Patterson denied that he brought up the fact that the discharge had nothing to do with the Union, but states that Santillo brought the subject up and he merely denied it. I credit Santillo on this point. In addition to demeanor considerations, I rely upon the fact that Van Horn also mentioned the discharge at the time, in connection with the Union and Santillo's activities on its behalf.

the times that he was taking a coffee break and stopping at his house, Patterson testified that he considered this conduct to be stealing time from Respondent by Santillo. The facts are not in dispute that Santillo did in fact take a coffee break every morning, and that he also stopped each day at his home for about 15 minutes before coming into the garage. There is much dispute, however, with respect to Company policy and warnings concerning these areas.

Patterson asserts that sometime in November 1978 he spoke to Santillo about taking coffee breaks, after he had received a complaint about it from Mr. Maloney of the School Department about Santillo stopping while children were on his bus to buy coffee. According to Patterson he told Santillo at that time that he should not be taking coffee breaks and that Santillo responded that he did not know it was wrong and promised not to do it again. Santillo recalls the conversation, but contends that the discussion only related to Santillo drinking coffee while he was transporting children, and that he agreed not to do this again. However, Santillo denies ever being told then or any time that coffee breaks in general are improper procedure. I credit Santillo's version of this conversation, particularly since Patterson when first asked about this discussion when examined by General Counsel under Section 611(c), of the Federal Rules, testified that the conversation had been restricted to Santillo driving the bus with coffee in his hand.

Santillo testified that he was unaware of any Company rule or prohibition of coffee breaks in general. Employees Nancy Danko, Ed West and Joseph Baer, all testified that they were unaware of any Company rule prohibiting coffee breaks, that they in fact had taken coffee breaks as a matter of course and had seen numerous other employees take such breaks, and had never been spoken to or warned about it by management.

Danko testified in fact, that she had on occasion brought back coffee to Patterson. Further, Respondent's driver information booklet, introduced into evidence, makes no reference to any Company rule regarding coffee breaks.

Employee Lee Holmes testified that he was spoken to about coffee breaks by Patterson, but that Holmes explained to Patterson the reason that there was a problem on his run was not the coffee breaks that he was taking, but due to the number of children on his run. Thereafter Holmes' run was changed and his route was rearranged. Although this change in route did reduce the amount of time Holmes was able to take for coffee breaks, he testified that he did thereafter take some coffee breaks and was always paid for the time during which he took these breaks.

Patterson's testimony concerning Company practice with respect to coffee breaks was confusing and contradictory. Initially, he testified that no coffee breaks were permitted, stating, "They are getting paid to pick up kids, that is what they should be doing." Upon further cross-examination, however, Patterson admitted that in some situations coffee breaks are permitted and in others they are not. Patterson was unable to specify clearly in which situations coffee breaks were authorized. However, he appeared to be saying that coffee breaks are allowed unless they in some way result in an adverse effect on the servicing of the drivers' route. Patterson also testified that when the Company finds out about these unauthorized coffee breaks, the normal practice is to change the drivers' route, or give him more children to pick up, or tell the driver to leave the garage later or simply not to pay the driver for the time spent while on coffee breaks.

I find based on the evidence as summarized above, that the taking of coffee breaks by Respondent's em-

ployees was a common occurrence, and that Respondent's officials knowingly tolerated this activity without question, unless the coffee breaks resulted in the drivers arriving too late or too early at their stops, or otherwise inconvenienced the children being transported. I also find that on those occasions when Respondent discovered that the taking of coffee breaks produced such a result, they would alleviate the situation by changing routes, increasing the number of children to be transported, changing the time a driver would leave the garage, or merely not paying the driver for the time.

With respect to the afternoon stopping by Santillo at his home before going back to the garage, Patterson testified that sometime in late February he received an anonymous call complaining about Santillo's bus being parked every day on Alcorn Drive. Patterson spoke to employees Kelly and Sanderopolis, who live on Alcorn Drive, and confirmed the fact that Santillo had been parking his bus every day for some 15 minutes in the afternoon between 5 p.m. and 5:20 p.m. Patterson testified that he asked Santillo if he was stopping his bus at his home before coming back to the garage, Santillo allegedly denied that he was stopping, and informed Patterson "every minute that bus is out of this garage it is rolling."

Santillo although admitting that he regularly stopped off at his home for 15–20 minutes before returning to the garage, denied ever being spoken to or asked about it by Patterson. Santillo explained that he stopped at his home in order to go to the bathroom. Santillo admitted that he was aware that he was not authorized by Respondent to take the bus home before reporting in, but attempted to justify his actions by pointing out that Respondent failed to pay employees for time spent gassing up before taking the bus out. Thus, in Santillo's mind his stopping at home was to make up for the failure of Respondent to pay him for the gassing up time. I

credit Patterson on the issue of whether Santillo was spoken to about this problem. I find it reasonable that Patterson after finding out about Santillo's behavior would mention it to him. I also find that Santillo denied making these stops because in his mind he was justified in doing so because Respondent unfairly refused to pay him for his gassing up time. I note, however, that Patterson admits and I so find that he at no time confronted Santillo with the confirmation that he had obtained from employees that Santillo was engaging in this conduct, and that he at no time warned Santillo that he would or might be subject to any kind of disciplinary action, much less discharge, if he continued to make these stops at home.

The remaining ground for Santillo's discharge according to Patterson was Santillo's leaving keys in his bus. Patterson asserts that Santillo had a habit of leaving his keys in the bus, and that he (Patterson) had spoken to Santillo about it on a number of occasions and warned him not to leave his keys in the bus. Patterson did not enumerate when these conversations occurred, but testified that he told Santillo that as it was turning to spring, Respondent was leaving the garage opened and that he did not want any of the buses disappearing. Patterson also testified that garage dispatcher Ronald Sulloway warned Santillo about leaving the keys in the bus on Thursday or Friday, March 22 or 23.

Sulloway testified as Respondent's witness, and despite extensive attempts by Respondent's counsel to lead him into corroborating Patterson on this point, denied that he had warned Santillo about leaving keys in the bus on the Thursday or Friday before his discharge. Sulloway testified that he did speak to Santillo 3 weeks before the discharge about leaving keys in the bus. According to Sulloway, Santillo responded by saying that he did not have to listen to Sulloway and Sulloway was the bosses' ass wiper. Sulloway further

testified that he reported to Patterson that he had told Santillo not to leave his keys in the bus anymore, and Patterson replied "O.K., you told him. We'll let it go. If it happens again we'll write him up."[8]

Sulloway further testified that on the day of Santillo's discharge, March 26, he again noticed Santillo leaving his keys in the bus. Sulloway alleges that he told Santillo that he had been warned before about the problem and this time he would have to write Santillo up. Again, Santillo allegedly said, that he did not have to listen to Sulloway. Sulloway alleges that he had reported the matter to Patterson in the morning and Patterson told him to speak to Santillo about it and he did so.

Patterson on the other hand does not mention Sulloway reporting this problem to him on the 26th or even discussing the matter with him on that date. Patterson testified that while Santillo was out on his morning run he made up his mind to discharge him, and that he intended to inform him when he returned to the garage from his run and brought his keys into the office. However, Santillo left the keys in the bus and went directly home without coming into the office. Therefore Patterson, when he found out that Santillo was not there, called him at home and told him to come in, and informed him of his discharge when he returned to the garage.

Santillo denies ever being warned or spoken to about leaving keys in the bus. Santillo admits that he would leave his keys in the bus while in the garage in between runs, but after his runs were complete he would put the keys on the key rack in the office. He also testified that he has frequently seen other employees leave their

[8] According to Sulloway Respondent has a system of written warnings which are issued to employees, and after three warnings, it is cause for dismissal. Patterson denied that Respondent has any kind of system of written warnings.

keys in the bus. Nancy Danko testified, that she would leave her keys in the bus from time to time and that she was never spoken to about it or made aware by Respondent officials that there was any rule against it.

I credit Santillo that he was never warned about this alleged problem and that there is no established Company rule prohibiting such conduct. Danko substantially corroborates Santillo's testimony, while the testimony of Sulloway and Patterson is filled with contradictions and inconsistencies on the subject.[9]

Patterson testified at length concerning this decision to discharge Santillo. He alleges that when Santillo in late February denied that he was stopping at home on the way back to the garage, he was suspicious and skeptical of such denials. Thus, he ordered a new tacograph to be placed in Santillo's bus, which would measure the amount of time that his bus was in operation and when it was stopped. The new tacograph was installed in his bus on March 12.[10]

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[9]Thus, Patterson testified, that Sulloway warned Santillo about leaving his keys in the bus on the Thursday or Friday before the discharge. Sulloway denied issuing such a warning but claims that he warned Santillo about 3 weeks before. Sulloway also testified that he noticed Santillo's leaving the keys in the bus on the day of his discharge (March 26), reported it to Patterson, who told him to speak to Santillo about it. Patterson makes no mention of this incident, and claims that he made up his mind to discharge Santillo before finding out his keys were left in the bus on the 26th. Moreover, Sulloway testified that in both conversations relating to this subject he talked about issuing warning notices to Santillo in connection with Respondent's system of three written warnings before a dismissal. Patterson denies that Respondent has any system of written warnings prior to dismissal.

[10]The installation of tacographs on buses is not an unusual procedure. In fact most other buses contained such an instrument and Santillo's bus itself contained a tacograph but it was not properly functioning.

The first week's reading according to Patterson measured only two days of the week. Although these 2 days demonstrated that Santillo had been taking breaks and stopping at home, Patterson did not take any action against Santillo, as he asserts that the graph was still incomplete. When asked why he did not bring the initial readings to Santillo's attention, Patterson testified at first that he was looking for evidence to fire him. Patterson then after being asked if he had determined to fire Santillo, answered, "No, I had determined to confront him with both his denials of the stops and the tacograph readings."

Patterson further testified that on Friday, March 23, he reviewed the tacographs and discovered gaps in time of 15 minutes in the morning and 15 minutes in the afternoon. According to Patterson it was in his mind at that time to discharge Santillo, but he had not finally made the decision. On Saturday, Patterson was in the office, but asserts that he did not look at the tacograph on that day. When asked why he did not do so, his response was that it did not occur to him on Saturday. On Monday, March 26, Patterson claims, that as part of his regular routine of reading all the tacographs, he read Santillo's graphs. He then discovered that for the previous week, Santillo actually worked 6 hours per day, while putting it for 6½ hours per day. This confirmation of the fact that Santillo was "cheating" on his time according to Patterson persuaded him that Santillo should be immediately discharged. He claims that he discussed the matter with supervisor Van Horn and his girlfriend, and they both concurred that Patterson should be discharged.[11] Patterson denied that he

[11] According to Patterson, his girlfriend had worked with Santillo for 2 years and she knew Santillo and what was going on. Her opinion allegedly was that Santillo should have been fired long ago.

consulted with Zimmerman or any other superiors in the main office or elsewhere about his decision to terminate Santillo.

B. *Concluding Findings*

1. 8(a)(1) Allegations

The evidence establishes that Respondent engaged in several violations of Section 8(a)(1) of the Act as alleged in the Complaint.

The statements made by Patterson to Baer, that he (Patterson) heard that Santillo started the Union, that Santillo was two faced, and that he was going to get even with Santillo, constitute unlawful threats of reprisals as well as create the impression of surveillance of employees' Union activities.

Respondent urges with respect to these remarks, that the evidence is not clear that the "getting even" referred to any Union activity and that it concerned a private situation between Santillo and Patterson not relating to Company granted privileges. Although Baer's testimony does indicate that the subject of Santillo having attempted to date Patterson's girlfriend did arise in their conversation in connection with Patterson getting even with Santillo, it is also clear that Patterson did say that Santillo started the Union, was two faced and Patterson was going to get even with him. The fact, that Patterson did not testify concerning this conversation, further reinforces my belief, that the "getting even" remarks did relate at least in part to the Union activities of Santillo and I so find.

Having so concluded, such a remark has been held to be a direct and unambiguous threat by a man who could deliver on it, and constitutes a violation of Section 8(a)(1) of the Act.[12]

[12]*Goodyear Aerospace Corporation*, 234 NLRB 539; See also *E. Mishan & Sons Inc.*, 242 NLRB 147; *Richard Tischler, et*

Respondent contends that the record is devoid of any evidence to sustain the allegation in the Complaint concerning Respondent creating an impression of surveillance of Union activities. I disagree. Patterson's remark to Baer that he heard that Santillo started the Union, reasonably tends to impress upon employees that the Company maintains surveillance of Union activities of said employees, including possibly his own, and constitutes a violation of Section 8(a)(1) of the Act.[13]

Patterson's comments to West, after ascertaining from West that Santillo was interested in the Union, that he would "remember" Santillo's Union activities, when Santillo asks him again for certain favors that Patterson had granted to Santillo, I find to be implied threats of reprisals in violation of Section 8(a)(1) of the Act.

Respondent contends again that the matter concerns a private matter between Patterson and Santillo, not involving Company granted privileges. However, the evidence is to the contrary, as one of the favors mentioned by Patterson was his practice of permitting Santillo to leave early from his job, in order to enable Santillo to be present at his other job running a Fair stand. Thus, I find, Patterson has threatened to withdraw his previously granted privilege to Santillo of adjusting his work schedule to accommodate his other job, in reprisal for his Union activities, in violation of Section 8(a)(1) of the Act.[14]

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al. d/b/a Devon Cables Lodge and Apartments, 237 NLRB 107; *Pittsburgh Press Co.*, 234 NLRB 408.

[13] *Jim Baker Trucking Company*, 241 NLRB 14; *Brown Mfg. Co.*, 235 NLRB 189; *James Innaco d/b/a Skyline Transport*, 228 NLRB 352; *Commerce Concrete Company Inc.*, 197 NLRB 658; *American National Shoes Inc.*, 195 NLRB 127.

[14] *Vincent's Steak House Inc.*, 216 NLRB 647.

Moreover, I find, that Patterson's implied threat to withdraw his permission for Santillo to park his personal truck in Patterson's driveway is also violative of the Act, even though not involving Company related privileges. Although Section 8(a)(3) of the Act requires discrimination in employment in order for the action to be violative of the Act, Section 8(a)(1)'s prohibition of restraint and coercion does not require that the restraint or coercion relate to a term or condition of employment. As long as the threat is found to be in reprisal for an employee's union activities, such a threat is a violation of Section 8(a) (1) of the Act.[15]

Although Patterson admits interrogating employees concerning their Union activities, Respondent contends that these incidents were isolated, casual and friendly in nature and should not be found violative of the Act. I conclude on the contrary, that Patterson's questioning coupled with the unlawful threats of reprisals and statements creating the impression of surveillance, were far from casual, isolated or friendly, and constitute coercive interrogations in violation of Section 8(a)(1) of the Act.

2. Discharge of Santillo

The evidence establishes a strong *prima facie* case of discrimination against Santillo because of his Union activities. All of the elements necessary for the finding of a violation are clearly present. Thus, Santillo was one of the prime organizers for the Union, and Respondent

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[15]See for example *Harold Jackson d/b/a Truck and Trailer Service*, 239 NLRB 137, where a threat to evict an employee from a house rented from a principal of the Employer, was found to be a violation, although the rental was not a Company related privilege. See also *Kent Brothers Transportation Co.*, 188 NLRB 53, and *E.M. Mishan, supra*, where threats of bodily harm to Union instigators were found to be violative of the Act.

was aware of this fact.[16] In addition, Respondent while asking about Santillo's Union activities, and creating the impression of surveillance of employees' union activities, called him two faced, said that he was taking it personally, threatened that he would "get even" with Santillo and threatened to withdraw favors he had previously been granting to Santillo. Thus, anti-union animus has clearly been established. Finally, the timing of the discharge on March 26, coming on the next working day after the unlawful threats described above, and on the very day that a Union meeting was scheduled for that evening and where Respondent was aware of the meeting being scheduled by virtue of having read the leaflets distributed by Union officials on that day to employees announcing the meeting, is highly indicative of a discriminatory motivation.

Respondent's asserted reasons for the discharge of Santillo fail to withstand scrutiny, and further tend to reinforce the conclusion that Santillo's discharge was unlawful. Santillo's having left his keys in the bus is clearly a pretextual reason, as by Patterson's own testimony he had made up his mind to discharge Santillo before finding out that he left his keys in the bus, on the 26th, and the practice of leaving keys in the bus I have found to be common practice at Respondent. Moreover, as noted above, the record reveals serious inconsistencies between the testimony of Company officials, Patterson and Sulloway on this subject.

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[16] Respondent's contention that Patterson although aware that Santillo was a Union supporter, was not aware of his leadership role in the Union is contradicted by the evidence of record. It is undisputed that Patterson told Baer that he heard that Santillo started the Union, and that he asked West "what's with Sam and the Union" and West confirmed Santillo's leadership role in the Union. Accordingly, it is clear that Patterson was fully aware that Santillo was a leader of the union organizing drive among its employees.

Respondent contends that the primary reason for the discharge was Santillo's alleged "stealing of time," by virtue of his unauthorized coffee breaks and his stopping off at his home before reporting into the garage. There is no question that Santillo was taking coffee breaks and stopping at his home before coming in. I have found, as noted, that the taking of coffee breaks by employees was normal practice, and that Respondent tolerated this practice without taking any kind of action unless the breaks interfered with a driver's route being properly performed. Moreover, I have found that in situations where such coffee breaks have resulted in such an effect on a driver's route, that Respondent would take such actions as changing a driver's route or the time that he left the garage, increasing the amount of children to be delivered, or simply not paying the driver for this "unauthorized" time. In no case does the record reveal a discharge, suspension or any other kind of disciplinary action taken against employees for engaging in such conduct.

Although, an argument can be made that Santillo's stopping at home before coming back to the garage can be differentiated from the taking of coffee breaks, and is a more serious transgression, I note that Respondent considered this conduct to be but another example of Santillo's taking unauthorized breaks and alleged "stealing" of time.

I deem it significant that even in Patterson's version of the facts that he never cautioned or admonished Santillo that his taking coffee breaks or his stopping at home, might lead to his dismissal or any other disciplinary action. Such an action on the part of an Employer is not natural and the failure to issue such a warning is indicative of discriminatory motivation.[17] In fact,

[17] *Savin Business Machines Co.*, 242 NLRB 82; *Laredo Packing Co.*, 241 NLRB 24; *Lamment Industries Inc.*, 229 NLRB

Patterson's own testimony also establishes that when he first became aware of the tacograph's establishing that Santillo was stopping at home in the evening, (before his Union activities) he had not determined to fire him, but had determined to confront him with both his denials of the stops and the tacograph readings. Yet when the tacograph readings in the next week further confirmed Santillo's stopping at home, (after his Union activity), Patterson did not as he intended to do, confront Santillo with his evidence, nor warn him of future disciplinary action. He also did not take any of the actions normally taken by Respondent when unauthorized breaks were found to have affected drivers' runs, such as changing routes, or times or increasing the number of children or not paying the driver for the time.[18]

Moreover, Respondent's own witness and garage dispatcher Sulloway, testified that the Company utilized a procedure of three written warnings before discharge. Yet no such written warnings were ever issued to Santillo. This further tends to buttress my conclusion that prior to the Union activities of Santillo, Respond-

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895; *The May Department Co., d/b/a The May Company*, 220 NLRB 1096.

[18]There was no probative evidence presented that any of Santillo's unauthorized time resulted in any detriment to the drivers' runs. Patterson on cross-examination for the first time mentioned that his reading of the tacograph revealed that Santillo had been dropping some children off early. However, Patterson admitted that no complaints were received about Santillo doing this, and that he never had any discussions with Santillo about this subject. I find that this was but a contrived attempt by Patterson to establish that Santillo's breaks were in fact having adverse effect on his route. In any event even if Patterson's testimony were to be credited in this regard, as noted Respondent's normal procedures in these circumstances were not followed.

ent did not consider his conduct so serious as to warrant his discharge.[19]

I conclude that a preponderance of the evidence establishes that Patterson's decision to discharge Santillo on March 26, was in furtherance of his threat made on March 23 to get even with Santillo for his Union activities, and was motivated by a desire to discourage union activities in violation of Section 8(a)(1) and (3) of the Act.

I am mindful of the fact that Santillo did engage in what might be considered unsatisfactory conduct. In other circumstances, it is reasonable to assume that some Employers would consider such conduct to be serious enough to justify discharge. In particular, I refer to Santillo's stopping at home before going back to work while being aware that he was not authorized to do so, and denying to Respondent that he was engaging in such conduct. However, I am persuaded that based on the record as a whole, the evidence is sufficient to establish that this Respondent would not have fired Santillo, one of his most experienced employees, but for his Union activities, but rather would have confronted him with Respondent's evidence, (as Patterson testified that he intended to do), warned him of possible future discipline, and/or taken any of the actions normally taken by Respondent where unauthorized breaks were discovered.[20] Therefore, Respondent has violated Section 8(a)(1) and (3) of the Act.[21] [Footnote 21 is on page 40a.]

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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[19] *Keller Mfg. Co.*, 237 NLRB 94.

[20] Respondent places great reliance upon the fact that Patterson ordered the tacograph placed in Santillo's bus prior to his engaging in any Union activities. However, the record re-

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by coercively interrogating employees regarding their activities on behalf and their support for the Union.

4. Respondent has violated Section 8(a)(1) of the Act by creating the impression among its employees that Respondent has engaged in surveillance of their union or other concerted activities.

5. Respondent has violated Section 8(a)(1) of the Act by threatening employees that it would get even with employees, or withdrawing privileges or favors previously granted to employees, because of its employees' activities on behalf of and support for the Union.

6. Respondent has violated Section 8(a)(1) and (3) of the Act by discharging and refusing to reinstate its employee, Sam Santillo because of his activities on behalf of and support for the Union.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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veals that it was not an unusual procedure to have such instruments in buses. In fact, most of Respondent's buses contained tacographs and in fact Santillo's bus also had such an instrument, but it was not working properly. Although, it is clear that Patterson was disturbed by Santillo's behavior prior to his Union activities, I conclude that his leadership role in the Union triggered Patterson's decision to terminate him on March 26, without confronting him with evidence of his malfeasance, warning him of possible discipline, or taking other action normally taken by Respondent in similar circumstances.

[21] *Keller Mfg. Co., supra; Savin Business Machines Co., supra; Laredo Packing Co., supra; Adams Delivery Service Inc.*, 237 NLRB 140; *Coletti's Furniture* v. *N.L.R.B.*, 550 F.2d 1292, 94 LRRM 3071 (C.A. 1, 1977).

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a) (1) and (3) of the Act, I shall recommend that it cease and desist from engaging in such unfair labor practices and take certain affirmative action provided in the recommended Order below, designed to effectuate the policies of the Act.

Respondent will be required to offer Sam Santillo immediate reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges. I shall further recommend that the Respondent make Santillo whole for any loss of earnings he may have suffered by reason of the unlawful discharge, with backpay to be computed on a quarterly basis, making deductions for interim earnings, and with interest to be paid on the amounts owing and to be computed in the manner prescribed in *F.W. Woolworth Company*, 90 NLRB 289 (1950) and *Florida Steel Corporation*, 231 NLRB 651 (1977).[22]

Upon the foregoing findings of fact, conclusions of law and the entire record pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[23]

ORDER

Transportation Management Corp., its officers, agents, successors and assigns, shall:

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[22] See generally, *Isis Plumbing & Heating Co.*, 139 NLRB 716.

[23] In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Discharging or otherwise discriminating against its employees because of their activities on behalf of and support for the Union or any other labor organization.

(b) Interrogating its employees regarding their activities on behalf of or support for the Union or any other labor organization.

(c) Creating the impression among its employees that Respondent is engaged in surveillance of their Union or other concerted activities.

(d) Threatening its employees that it will get even with employees, or withdrawing privileges or favors previously granted to employees, or otherwise retaliating against its employees, because of its employees' activities on behalf of or support for the Union.

(e) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.:

(a) Offer to Sam Santillo immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve, and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payroll records, timecards, personnel records and reports, and all other records necessary, or appropriate, to analyze the amount of backpay due.

(c) Post at its place of business in Springfield, Massachusetts, copies of the attached notice marked

"Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's authorized representative, shall be posted by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of the receipt of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C., February 8, 1980.

/s/ _____

STEVEN B. FISH
Administrative Law Judge

[24] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

FORM NLRB—4727
(9–69) JD–(NY)–4–80

NOTICE TO EMPLOYEES

Posted by Order of The
National Labor Relations Board
An Agency of the United States Government

AFTER A TRIAL IN WHICH ALL SIDES HAD A CHANCE TO GIVE EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT AND HAS ORDERED US TO POST THIS NOTICE.

We intend to abide by the following:

The Act gives all employees these rights:

To engage in self-organization;

To form, join, or help unions;

To bargain collectively through representatives of their own choosing;

To act together for collective bargaining or other mutual aid or protection;

To refrain from any or all of these things.

WE WILL NOT discharge or otherwise discriminate against any employees to discourage membership in GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, BUILDING MATERIALS, HEAVY & HIGHWAY CONSTRUCTION EMPLOYEES LOCAL UNION 404, a/w THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, herein called the Union, or any other labor organization.

WE WILL NOT discharge or otherwise discriminate against our employees because of their activities on behalf of or support for the Union or any other labor organization.

WE WILL NOT interrogate our employees regarding their activities on behalf of or support for the Union or any other labor organization.

WE WILL NOT create the impression among our employees that we have engaged in surveillance of their Union or other concerted activities.

WE WILL NOT threaten our employees that we will get even with employees, or withdraw privileges or favors previously granted to employees or otherwise retaliate against our employees, because of our employees' activities on behalf of or support for the Union.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL offer Sam Santillo immediate and full reinstatement to his former job and WE WILL compensate him with interest for any loss of pay he may have suffered because we terminated him.

TRANSPORTATION MANAGEMENT CORP.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Keystone Building, 99 High Street, Boston, Massachusetts 02110 Telephone No. (617) 223-3313.